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Wong Ban Chong v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO 45B-54–07 OF 2012
MOHTARUDIN BAKI, ZAKARIA SAM AND ABDUL RAHMAN SEBLI JJCA
11 DECEMBER 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted for murder and causing grievous hurt to another person — Offence committed in same transaction — Penal Code ss 302 and 326 — Accused person applied to be sent for psychiatric examination — Period of D *remand not specified — Exceeded one month — Whether accused person capable of making defence — Criminal Procedure Code s 342*

The appellant was convicted by the High Court for the murder of his ex-wife E under s 302 of the Penal Code and of causing grievous hurt to another person under s 326 of the same Code. The offences were committed in the same transaction. When the appellant was first produced before the judicial commissioner ('JC'), counsel for the appellant applied for the appellant to be sent for psychiatric examination and the application was granted. The F appellant was ordered to be detained at Hospital Bahagia Tanjung Rambutan for psychiatric observation but without specifying the period of remand, contrary to s 342(3) of the Criminal Procedure Code ('CPC') which stipulates that the period of remand shall not exceed one month. The case was then adjourned to a period of more than one month after the remand order was G made. There was no record to show that the extended remand period was made pursuant to s 342(4) of the CPC. When the trial commenced, there was no record to show that the medical director had certified pursuant to s 343(1) that the appellant was of sound mind and capable of making his defence. At the end of the trial, the appellant was sentenced to death for the first charge while for H the second charge he was sentenced to eight years imprisonment with effect from the date of his arrest. This appeal concerned the duty of the court where the accused was suspected to be of unsound mind and consequently incapable of making his defence.

I **Held**, allowing the appeal; setting aside the conviction and sentence:

(1) The fact that the JC made the remand order showed that he was not satisfied that the appellant was capable of making his defence due to unsoundness of mind. What the JC should have done as the next step after making the remand order was to wait for the psychiatrist report

issued by the medical director pursuant to s 343(1) of the CPC. It was only when the appellant had been certified to be of sound mind and capable of making his defence that the trial should have proceeded. In the absence of such certification it was wrong for the JC to have proceeded with the trial, let alone to have convicted the appellant of the offences charged (see para 7).

(2) At the trial, neither the prosecution nor counsel who appeared for the appellant raised the issue of the appellant's capability to make his defence but it was the duty of the JC to ascertain this fact, having made the order of remand for psychiatric observation pursuant to s 342(3). By proceeding with the trial without ascertaining the result of the observation, the JC had contravened the requirements of ss 342 and 343 of the CPC (see para 11).

(3) The policy reason behind s 343(2) of the CPC is not hard to understand. If the accused is unfit to stand trial due to unsoundness of mind, he is not expected to be able to follow the proceeding intelligently or to give proper instructions to his counsel. The trial cannot be considered fair when the accused is unable to understand the nature of the case that is being made out against him. This is so even where he is represented by counsel (see para 10).

(4) The requirement of s 343(2) of the CPC which imposes on the trial judge or magistrate the duty to make a finding as to the mental state of the accused and to postpone the trial if the accused is incapable of making his defence is a mandatory requirement and failure to comply will render the trial a nullity. It is not a mere irregularity curable under s 422 of the CPC. The case was ordered for a re-trial before another judge (see para 13).

[Bahasa Malaysia summary

Perayu disabitkan oleh Mahkamah Tinggi kerana membunuh bekas isterinya di bawah s 302 Kanun Keseksaan dan menyebabkan luka parah kepada seorang yang lain di bawah s 326 Kanun yang sama. Kesalahan-kesalahan dilakukan dalam transaksi yang sama. Apabila perayu pertama kali dikemukakan di hadapan pesuruhjaya kehakiman ('PK'), peguam untuk perayu memohon untuk perayu dihantar bagi pemeriksaan psikiatrik dan permohonan telah diberikan. Perayu diperintahkan ditahan di Hospital Bahagia Tanjung Rambutan untuk pemerhatian psikiatrik tetapi tanpa menyatakan tempoh masa ditahan, bertentangan s 342(3) Kanun Tatacara Jenayah ('KTJ') yang mana menjelaskan bahawa tempoh tahanan tidak akan melebihi satu bulan. Kes ditangguhkan kepada tempoh masa lebih daripada satu bulan selepas perintah tahanan dibuat. Tidak terdapat rekod untuk menunjukkan bahawa tempoh tahanan yang dilanjutkan adalah dibuat berikutan s 342(4) KTJ. Apabila perbicaraan bermula, tidak terdapat rekod untuk menunjukkan bahawa Pengarah Perubatan telah mengesahkan berikutan s 343(1) bahawa

perayu adalah waras dan boleh membuat pembelaannya sendiri. Pada akhir perbicaraan, perayu dijatuhkan hukuman mati untuk tuduhan pertama sementara tuduhan kedua dia dihukum penjara selama lapan tahun berkuat kuasa dari tarikh penangkapannya. Rayuan ini adalah mengenai tugas mahkamah di mana tertuduh disyaki tidak waras dan akibatnya tidak dapat membuat pembelaannya sendiri.

Diputuskan, membenarkan rayuan; mengetepikan sabitan dan hukuman:

(1) Fakta bahawa PK membuat perintah tahanan menunjukkan yang dia tidak berpuas hati yang perayu dapat membuat pembelaannya akibat ketakwarasan. Apa yang PK perlu buat sebagai langkah seterusnya selepas membuat perintah tahanan adalah untuk menunggu laporan pakar sakit jiwa yang dikeluarkan oleh pengarah perubatan berikutan s 343(1) KTJ. Ia hanya bila perayu disahkan waras dan dapat membuat pembelaannya perbicaran patut diteruskan. Dalam ketiadaan pengesahan sedemikian adalah salah untuk PK untuk meneruskan dengan perbicaraan, lebih lagi menyabitkan perayu terhadap kesalahan yang dituduh tersebut (lihat perenggan 7).

(2) Pada perbicaraan, tidak pihak pendakwaan atau peguam yang mewakili perayu membangkitkan isu kemampuan perayu untuk membuat pembelaannya tetapi ia adalah tugas PK untuk memastikan fakta ini, setelah membuat perintah tahanan untuk pemerhatian psikiatrik berikutan s 342(3). Dengan meneruskan perbicaraan prosiding tanpa memastikan keputusan pemerhatian, PK telah melanggar kehendak ss 342 dan 343 KTJ (lihat perenggan 11).

(3) Alasan polisi s 343(2) KTJ tidak susah untuk difahami. Jika tertuduh tidak sihat untuk menghadiri perbicaraan akibat ketidakwarasan, dia tidak dijangka untuk dapat mengikut prosiding secara bijak atau memberi arahan betul kepada peguamnya. Perbicaraan tidak dapat dikatakan adil apabila tertuduh tidak dapat memahami sifat kes yang dibuat terhadapnya. Ini adalah imbang di mana dia diwakili oleh peguam (lihat perenggan 10).

(4) Kehendak s 343(2) KTJ yang mana dikenakan ke atas hakim perbicaraan atau majistret tugas untuk membuat dapatan terhadap keadaan mental tertuduh dan untuk menangguhkan perbicaraan jika tertuduh tidak dapat membuat pembelaannya adalah kehendak mandatori dan kegagalan untuk mematuhi akan menyebabkan perbicaraan tak sah. Ia bukan luar aturan yang boleh dibaiki di bawah s 422 KTJ. Kes ini diperintahkan untuk perbicaraan semula di hadapan hakim yang lain (lihat perenggan 13).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Legislation referred to

Criminal Procedure Code ss 342, 342(3), (4), 343(1), (2), 348, 422
Penal Code ss 84, 96, 302, 326

Appeal from: Case No 45B-54–09 of 2012 (High Court, Alor Setar)

Afifudin Ahmad Hafifi (Salehuddin Saidin & Assoc) for the appellant.
Mohd Fairuz bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA:

[1] The appellant was convicted by the High Court of Alor Star for the murder of his ex-wife under s 302 of the Penal Code and of causing grevious hurt to another person under s 326 of the same Code. The offences were committed in the same transaction. For the first charge the appellant was sentenced to death while for the second charge he was sentenced to eight years imprisonment with effect from the date of his arrest. His defence which the learned judicial commissioner ('the learned JC') rejected was the right of private defence under s 96 of the Penal Code.

[2] This appeal concerns the duty of the court where the accused is suspected to be of unsound mind and consequently incapable of making his defence. We reproduce below the relevant provisions of Chapter XXXIII of the Criminal Procedure Code ('the CPC') which prescribes the procedure to be followed:

> *342 Procedure where accused is suspected to be of unsound mind.*
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> (1) When a Judge or a Magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence he shall in the first instance investigate the fact of such unsoundness.
>
> (2) At the investigation it shall not be necessary for the accused person to be present and the Judge or Magistrate may receive as evidence a certificate in writing signed by a Medical Officer to the effect that the accused person is in his opinion of unsound mind or is a proper person to be detained for observation in a psychiatric hospital, or the Judge or Magistrate may, if he sees fit, take oral evidence from the Medical Officer on the state of mind of the accused person.
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> (3) If not satisfied that the person is capable of making his defence, the Judge or Magistrate shall postpone the trial and shall remand that person for a period not exceeding one month to be detained for observation in any psychiatric hospital in Malaysia.

(4) The Medical Director of the said psychiatric hospital shall keep that person under observation during the period of his remand and before the expiry of that period shall certify under his hand to the Court his opinion as to the state of mind of that person, and if he is unable within the period to form any definite conclusion, shall so certify to the Court and shall ask for a further remand. Such remand may extend to a period of two months.

343 Certificate of Medical Director.

(1) If the Medical Director shall certify that the accused person is of sound mind and capable of making his defence the Judge or Magistrate shall proceed with the trial.

(2) If the Medical Director shall certify that that person is of unsound mind and incapable of making his defence the Court shall, if satisfied of the fact, find accordingly, and thereupon the trial shall be postponed.

(3) The certificate of the Medical Director shall be receivable as evidence under this section.

(4) If the person is certified to be of unsound mind and incapable of making his defence it shall not be necessary for him to be present in Court during proceedings under this section.

[3] Thus the procedure is that where the trial judge or magistrate has reason to suspect that the accused is of unsound mind and consequently incapable of making his defence, he must investigate that fact and if not satisfied that the accused is capable of making his defence, to order the accused to be detained at any psychiatric hospital for a period not exceeding one month for psychiatric observation. It needs no emphasis that the suspicion must be a reasonable suspicion and not just any suspicion.

[4] At the end of the observation period of one month or any extended period, if the trial judge or magistrate is satisfied with the medical director's certification that the accused is of unsound mind and incapable of making his defence, the trial must be postponed. The medical director's certification must be accepted at its face value unless contradicted by another expert, in which case the trial judge or magistrate will decide accordingly.

[5] In the present case the notes of proceeding shows that on 22 October 2012 when the appellant was first produced before the learned JC, counsel applied for the appellant to be sent for psychiatric examination. The application was granted by the learned JC whereupon the appellant was ordered to be detained at Hospital Bahagia Tanjung Rambutan for psychiatric observation but without specifying the period of remand, contrary to s 342(3) which stipulates that the period of remand shall not exceed one month.

[6] The case was then adjourned to 25 November 2012 and subsequently to 21 April 2013 for trial, a period of more than one month after the remand order

was made. There is no record to show that the extended remand period was made pursuant to s 342(4). Likewise when the trial commenced on 21 April 2013 there is no record to show that the medical director had certified pursuant to s 343(1) that the appellant was of sound mind and capable of making his defence. Despite that the trial proceeded to its conclusion on 5 August 2013 whereupon the appellant was found guilty of both charges.

[7] The fact that the learned JC made the remand order on 22 October 2012 shows that he was not satisfied that the appellant was capable of making his defence due to unsoundness of mind. What the learned JC should have done as the next step after making the remand order was to wait for the psychiatrist report issued by the medical director pursuant to s 343(1) of the CPC. It was only when the appellant had been certified to be of sound mind and capable of making his defence that the trial should have proceeded. In the absence of such certification it was wrong for the learned JC to have proceeded with the trial, let alone to have convicted the appellant of the offences charged.

[8] In the context of s 342 of the CPC, unsoundness of mind refers to the accused's mental capacity to make his defence. It has nothing to do with the defence of unsoundness of mind under s 84 of the Penal Code. That is a matter to be decided at the conclusion of the trial, if the defence of insanity is raised. The court's only concern under the procedure prescribed by s 342 is to determine whether the accused is mentally fit to stand trial.

[9] There are therefore two situations under Chapter XXXIII of the CPC where unsoundness of mind becomes an issue, one at any time during the course of the trial (s 342) and the other at the conclusion of the trial where the defence of insanity is raised and proved (s 348).

[10] The policy reason behind s 343(2) of the CPC is not hard to understand. If the accused is unfit to stand trial due to unsoundness of mind, he is not expected to be able to follow the proceeding intelligently or to give proper instructions to his counsel. The trial cannot be considered fair when the accused is unable to understand the nature of the case that is being made out against him. This is so even where he is represented by counsel.

[11] It is true that at the trial neither the DPP nor counsel who appeared for the appellant raised the issue of the appellant's capability to make his defence but in our view it was the duty of the learned JC to ascertain this fact, having made the order of remand for psychiatric observation pursuant to s 342(3). By proceeding with the trial without ascertaining the result of the observation, the learned JC had contravened the requirements of ss 342 and 343 of the CPC.

[12] The question is whether such contravention is a mere irregularity

curable under s 422 of the CPC as contended by the learned DPP. He urged upon us to uphold the decision as there is sufficient evidence to support the convictions. In our view the merits of the case are irrelevant as the trial should not have proceeded in the first place.

[13] The requirement of s 343(2) of the CPC which imposes on the trial judge or magistrate the duty to make a finding as to the mental state of the accused and to postpone the trial if the accused is incapable of making his defence is a mandatory requirement and failure to comply will render the trial a nullity. It is not a mere irregularity curable under s 422 of the CPC. It was for this reason that we set aside the convictions and sentence and ordered for a retrial before another judge.

Appeal allowed; conviction and sentence set aside.

Reported by Afiq Mohamad Noor